Public Knowledge

September 20, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch:

Much of the commentary around Chairman Wheeler's apps-based plan to "unlock the box" focuses around the concept of licensing and related issues of legal authority. Because the term "licensing" applies to many activities related to providing MVPD service it is understandable that there has been some confusion on this point. But as Public Knowledge understands it, the plan does not involve the Commission reviewing or setting conditions for the MVPD carriage of programming in any way—as before, carriage agreements will take place in the marketplace and will not be subject to review under this proposal.

Rather, PK understands that what has been contemplated is, **(1)** The FCC establishing a regime where MVPDs only provide apps to device or platform vendors with which they have established contractual privity,[1] and **(2)** The FCC ensuring that any such agreements (which are a form of *software* license) do not hinder competition. The FCC is well within it statutory authority to carry this out. The fact that a particular MVPD regulation might have some effect on the availability of programming to viewers—as nearly any MVPD regulation must, given the nature of MVPD service—does not somehow put the apps plan in tension with copyright law. As the Commission has explained, "Communications law and copyright law can create independent rights – even with respect to the distribution of the same content."[2] Similarly to past FCC actions, after implementation of the apps "the underlying rights and remedies available to copyright holders remain unchanged," because the plan does not "alter the defenses and penalties applicable in cases of copyright infringement."[3]

As an initial matter, 47 U.S.C. § 549 (Section 629 of the Communications Act, as amended) directs the FCC to assure device competition, but does not detail exactly how it must do so. Simply put, the Commission is charged to use its best judgment to assure the result Congress intended, subject to certain conditions (e.g., it must "adopt regulations," not harm system security, and continue to allow MVPDs to supply their own equipment to customers who want it). Under

[1] Notably, this gives MVPDs a stronger relationship with the competitive marketplace than cable operators have today with CableCARD vendors, since CableCARD vendors do not individually sign agreements with cable operators but instead sign a single industry-wide agreement

[2] Implementation of Section 304 of the Telecommunications Act of 1996, CS Docket 97-80, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20885, ¶ 54 (rel. October 9, 2003).

[3] *Id.* ¶ 9.

that statute, it has the authority to take steps to counter factors it believes may "impede" competition, and as an expert agency, its decision-making is entitled to deference.[4] This does not mean that the FCC's authority under Section 629 is "unbridled"[5]—the Commission must still identify a need under its statutory mandate before acting—but the case that some oversight is necessary to ensure that MVPD/device agreements do not undermine competition does not seem particularly difficult to make. Thus there is no support for claims that the FCC's authority somehow does not apply to the apps-based proposal—which is, after all, based on proposals put forward by the MVPD and programming industry themselves.[6]

Thus, if the FCC determines that it is necessary to adopt some means of ensuring that MVPD/device manufacturer agreements assure useful access to MVPD content and do not impede competition, it has the authority to do so. Of course, the most on-point precedent for this is likely the Commission's existing device competition rules. For example, in a previous rulemaking, the Commission noted that "[p]rivate industry negotiations between cable operators and consumer electronics manufacturers resulted in a Memorandum of Understanding ('MOU') on a cable compatibility standard for an integrated, unidirectional digital cable television receiver, as well as for other unidirectional digital cable products."[7] The Commission found that the terms of this privately-negotiated MOU furthered the public interest and used it as the basis of its rules.[8]

But the Commission can look to other precedent in promoting device competition. For example, in its C Block rules, the Commission directed licensees to establish private standards to carry out its requirements—while reserving for itself the right to review the outcome. It wrote,

> We will not at this time specify a particular process for C Block licensees to develop reasonable network management and openness standards, but we will require certain

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[4] *Charter Communications v. FCC*, 460 F. 3d 31, 40-41 (DC Cir. 2006); *General Instrument Corp. v. FCC*, 213 F. 3d 724, 731-32 (DC Cir. 2000).

[5] *EchoStar Satellite v. FCC*, 704 F. 3d 992, 997 (DC Cir. 2013). The EchoStar decision's concern about FCC authority are generally allayed by the Commission's need to adequately explain its decisions and justify the need for the Commission to act with respect to a specific service.

[6] In particular, arguments that the FCC's authority cannot be used with relation to apps because apps are not "equipment" are nonsensical. Third-party devices that have access to MVPD-supplied apps that offer full parity of programming and features with MVPD-provided set-top boxes are plainly "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems," third-party devices that do not have such access, are not. By adopting an apps-based approach, the FCC will be fulfilling its statutory mandate by promoting a competitive marketplace of equipment that can access MVPD services; the apps themselves are merely a means to that end.

[7] Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment, 18 FCC Rcd 20885, App. C ¶ A (2003)

[8] *Id.* 55-57. The Commission was later found to be deficient insofar as it applied content encoding rules to satellite providers without a sufficient factual record relating these rules to device access to satellite content and explaining why these rules were necessary to further Section 629. *Echostar* at 1000. It should be noted that one could read the *Echostar* court as stating that any measures taken by the FCC to implement Section 629 that are not specifically mentioned by the text of Section 629 should be viewed as applications of ancillary authority. *Echostar* at 997-98, 1000. But this would be an implausible conclusion, and not one the court could have intended, because the text of Section 629 does not mention *any* specific means the FCC should take to carry out its directive. Existing CableCARD rules are a *direct* application of FCC authority, not an ancillary one.

> minimum steps to ensure that device manufacturers and application developers have the ability to design products for this spectrum in a timely manner. Specifically, a C Block licensee must publish standards no later than the time at which it makes such standards available to any preferred vendors (i.e., vendors with whom the provider has a relationship to design products for the provider's network). .... Finally, the Commission will ensure the sufficient openness of any network management practices and selected technical standards in the event the approach outlined above proves unsatisfactory.[9]

The Commission promised to "vigorously enforce" this requirement.[10]

As stated above, the actual carriage agreement between MVPDs and programmers will continue to be negotiated in the marketplace, and will not be subject to FCC review under rules implementing Section 629. These carriage agreements will continue to grant to MVPDs, as they do today, the authority to deliver copyrighted programming to their subscribers. Just as these carriage agreements today grant cable companies the copyright licenses they need to deliver programming to subscribers using both first-party and CableCARD devices, these carriage agreements will continue to be the means by which MVPDs obtain the necessary licenses to deliver programming to subscribers, including to subscribers using MVPD-provided apps on competitive devices.[11] While these are market negotiations, existing, unrelated FCC and statutory rules such as retransmission consent, must-carry, and program carriage will continue to apply. Furthermore, MVPDs will not be able to bypass competitive device support requirements by entering into carriage agreements purporting to do so, just as cable companies cannot evade CableCARD requirements by such means. The FCC's rules must continue to serve as a backdrop to private agreements—private agreements are not a means to bypass them.

Nevertheless, some programmers object to this framework, and believe they should be permitted to create exceptions to FCC rules for their programming—otherwise, they argue, FCC rules would "allow their content to be distributed on terms or conditions to which they otherwise would not agree,"[12] which they maintain amounts to a compulsory copyright license. But the NCTA has explained why this line of argument is faulty:

> MPAA argues that the FCC does not have jurisdiction to adopt [rules implementing Section 629] because the proposed rules "necessarily limit[ ] and define[ ] the property rights of copyright owners." MPAA is mistaken in its premise. As an initial matter, the proposed rules impose limitations on an MVPD's distribution of programming content, not on the programmer's actions. The Commission has taken the same approach in other contexts, such as closed captioning, children's programming, and programming providing emergency information (i.e., the rules are imposed on the MVPD, not directly on the programmer), and can do so here.

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[9] Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Second Report and Order, 22 FCC Rcd. 15289, ¶ 224 (2007).

[10] *Id*. ¶ 229.

[11] The compulsory license system for broadcast programming does not change this analysis since MVPDs still must negotiate with broadcasters for signal carriage.

[12] Letter to Marlene H. Dortch from Viacom, MB Docket No. 16-42 (September 7, 2016).

> Moreover, many rights exist and are regulated independent of copyrights. The FCC was upheld in regulating the degree of "syndicated exclusivity" that could be exercised when cable systems imported television programming (copyrighted or not) into other television markets. Retransmission consent was created as one right independent of rights in the underlying copyright of broadcast works re-transmitted on cable. The DMCA creates another set of rights and limitations for technological measures protecting access to a work that exist independent of underlying copyrights.
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> Similarly, the encoding rules create another set of limitations on device recognition of tools that exist independent of copyrights in a work. They have no bearing on whether one of the content owner's exclusive rights under section 106 of the Copyright Act has been infringed.[13]

The NCTA argued this in 2003. While it seems to suggest *today* that FCC authority is limited is it has any effect on what kinds of terms a programmer may demand of an MVPD,[14] the NCTA's more-considered legal analysis of 2003 is more persuasive.

Moreover, the fact that MVPD carriage comes with certain conditions is not new, and does not provide a basis for programmers to challenge these conditions. Fundamentally, programmers are under no obligation to be carried by MVPDs. An analogous matter will illustrate this. In *Pandora Media v. ASCAP*, 785 F. 3d 73 (2d Cir. 2015), some music copyright holders argued that the consent decrees that govern the performance rights organizations (PROs) they do business with improperly interfered with their rights. The court disagreed, writing

> This outcome does not conflict with publishers' exclusive rights under the Copyright Act. Individual copyright holders remain free to choose whether to license their works through ASCAP. They thus remain free to license—or to refuse to license—public performance rights to whomever they choose. Regardless of whether publishers choose to utilize ASCAP's services, however, ASCAP is still required to operate within the confines of the consent decree.

Analogously, MVPDs must follow the rules set out by Congress and the Commission for MVPDs. That these rules limit the kinds of things a programmer can request of an MVPD does not render them unlawful. To be clear, the Commission should avoid imposing rules on MVPDs that would cause a programmer to pull its programming, and there is no reason to think that apps-based approaches, which have previously been endorsed by programmers, would be such rules.[15]

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[13] Reply Comments of the National Cable & Telecommunications Association, CS Docket No. 97-80 (April 28, 2003) (citations omitted).

[14] Statement of NCTA Regarding Chairman Wheeler's New Set-Top Box Proposal, Press Release, September 8, 2016, https://www.ncta.com/news-and-events/media-room/content/statement-ncta-regarding-chairman-wheeler's-new-set-top-box-proposal.

[15] It should be noted that some programmers claimed they would remove all or some of their programming from over-the-air broadcast unless the FCC implemented the broadcast flag. For example, Viacom claimed that "[I]f a broadcast flag is not implemented and enforced by Summer 2003, Viacom's CBS Television Network will not provide *any* programming in high definition for the 2003-2004 television season." Comments of Viacom, MB Docket 02-230, at 1 (December 6, 2002). Of course, the broadcast flag was never implemented, and high-definition programming was made available over the air nonetheless.

But the analogy to PROs is enough to demonstrate that MVPD rules that have some effect on programming do not constitute a compulsory license.

Respectfully submitted,

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